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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL ANGEL JOSE-BARRIOS,

Defendant and Appellant.

H044488

(Santa Clara County  
Super. Ct. No. C1480909)

A jury convicted defendant Miguel Angel Jose-Barrios of committing 17 sex crimes against the victim, who was under 10 years old at the time of the offenses. On appeal, defendant raises two claims of evidentiary error, a cumulative error claim, and a claim of error in the abstract of judgment and minute order with respect to the sentence on count 11. We find no reversible error. We do, however, agree with defendant that the abstract of judgment and minute order contain clerical errors as to the sentence on count 11. Our review of the record also revealed other errors in the abstract of judgment and minute order, as well as the imposition of unauthorized sentences on two counts. We modify the judgment to correct the unauthorized sentences, affirm the judgment as modified, and direct the superior court to amend the abstract of judgment to reflect the oral pronouncement of judgment, as modified.

## **I. BACKGROUND**

### **A. *The Molestations***

The victim was born in 2004. When she was about two years old, her mother met defendant, a family friend of mother's then-boyfriend, Victor. Mother and Victor later married and had a son together in 2008. Defendant frequently helped the family by driving mother and Victor to work, doing household chores, and babysitting the children. The family saw him almost every day.

Mother and Victor split up in mid-2009, after which mother and the victim saw defendant infrequently. In late 2013, defendant contacted mother on Facebook and told her he missed her and the victim and would like to see them. Mother was excited to hear from her old friend. Defendant took mother, her son, and the victim out to dinner. He took the victim to the movies sometime in early 2014.

Defendant again took the victim—then nine years old—to the movies on February 16, 2014. When defendant brought the victim home after the movie, the victim mentioned to mother that they had gone to defendant's home before going to the movie theater, which surprised mother. The defendant hung around for at least an hour, which was unusual, according to mother. Mother grew suspicious because defendant was sweating, his face was red, and he seemed nervous.

After defendant left, mother asked the victim if defendant had hurt her. The victim said that nothing had happened, but she had tears in her eyes and mother suspected she was lying. About 30 minutes later, the victim told mother that, while they were at defendant's home, defendant had told her to remove her clothing so he could see what sizes she wore. The victim also told mother that defendant had tickled her; when mother asked where, the victim pointed to her vagina.

Mother asked the victim whether there were other instances when defendant had touched her. The victim told mother that once, when they ran out of toilet paper, defendant had cleaned her with his tongue. The victim also told her mother that once

defendant had tripped and his knee hit her in the vagina as he fell. She said that defendant had kissed her vagina to make it feel better. Mother called the victim's father, who came over. They then called the police.

San Jose police were dispatched to the victim's home at 2:48 a.m. on February 17, 2014. The victim gave a recorded statement to officers at that time, which was played for the jury. The victim was interviewed by police twice more, on February 19, 2014 and on March 26, 2014. Recordings of those interviews also were played for the jury at defendant's trial. The victim also testified at defendant's trial, which took place in April and May of 2016, at which time she was 12 years old and in the sixth grade. At trial, she frequently had to have her recollection refreshed with the transcripts of her prior interviews. During those interviews and at trial, the victim recounted the following instances of sexual abuse.

While defendant was babysitting, the victim went to the bathroom. There was no toilet paper, so she asked defendant to find some. When he could not, he licked her private parts clean. During the February 19, 2014 police interview, she said that defendant licked her "front and back." At trial, she testified that he licked her vagina, but could not remember if he licked her anus.

Once, the victim and defendant were sleeping on the floor beside mother and Victor's bed. Early in the morning, while mother and Victor slept, the victim awoke to defendant's penis going in between her butt cheeks. Her pajama pants and underwear were off. She moved away and saw a white, wet substance on the blanket. On the same occasion, defendant lifted his shirt and asked the victim to scratch his nipples. She shrugged; he took her hand and made her scratch his nipples.

The victim had a vaginal rash one of the times that defendant babysat her. Defendant couldn't find any ointment, so he licked her vagina and rubbed his penis between the lips of her vagina, which he said would help. There was "white stuff" on the tip of his penis.

Another time that defendant babysat, he fell and hit the victim in the vagina with his knee. He removed her pants and underwear and kissed and massaged her vagina to make it feel better. He also made the victim touch his penis under his clothes on that occasion.

Defendant showered with the victim twice. During one shower, he made her scrub his penis and inserted his finger in her vagina. She described his penis as being “like a pencil, except not sharp.” On the other occasion, he made her scrub his nipples and stomach in the shower.

In early 2014, defendant took the victim to the movies. Before going to the theater, they went to his home, where they watched part of a movie. He pulled her on top of him while they were on the couch; she felt his penis poking her. He told her to kiss him on the cheek, which she did. He kissed her neck and kissed her on the lips with his tongue.

On the evening of February 16, 2014, mother gave defendant permission to take the victim to see *The Lego Movie* in the theater. After defendant picked the victim up, they went to his apartment before going to the movie theater. There, they watched part of *Despicable Me 2*. While that movie was playing, defendant asked the victim to take off her clothes; he said he wanted to look at the tags so he could buy her new clothes. She removed her shirt and pants and, at defendant’s direction, sat on his lap wearing only her underwear. Eventually, she put her clothes back on. They continued watching *Despicable Me 2*. The victim was lying on top of defendant on the couch. He put his hand down the back of her pants and inserted a finger in her anus. She moved away. At some point while they watched *Despicable Me 2*, defendant tickled the victim’s vagina with his fingers. He also used his hands to guide the victim’s hands to his penis, making her touch it over his clothing.

***B. Defendant's Police Interview and Testimony***

Detective Ken Hoggard interviewed defendant on February 27, 2014. A recording of that interview was played for the jury at trial. At the beginning of the recording, Detective Hoggard informed defendant that he was not under arrest and that he was free to leave at any time. Defendant told the detective that he had been sick with food poisoning since the prior week and hadn't been able to keep any food down. He complained of feeling sick but said he could continue with the interview; he was given the opportunity to stop the interview, which he did not take. Defendant's first language is Spanish, but he was interviewed in English. He made frequent grammatical errors, including confusing "his" and "hers." He told the detective interviewing him that his understanding of English was at an 85 to 87 percent level.

Defendant told the detective that he was giving mother and the victim a ride home one recent Sunday evening when mother gave him permission to take the victim to see *The Lego Movie* that night. He took the victim to his home first because the movie didn't start until later. He put *Despicable Me 2* on while they waited. Defendant said he asked the victim what size clothing she wore because he wanted to buy her new clothes. According to defendant, the victim—to his surprise—removed her pants, underwear, and shirt so that he could check the tags for sizes. Defendant said he tickled the victim with her clothes on but did not touch her vagina. He also said that at some point that night, he tried to help the victim pull up her underwear and his hand got stuck in her pants. He said his hand "probably" went between her butt cheeks at that time, but he denied penetrating her anus.

Defendant said that on another occasion the victim said she had a rash and he put ointment on her vagina. When the detective asked the defendant if he licked the victim's vagina at that time, he initially claimed he could not remember. Later, he acknowledged licking her vagina when she had the rash, saying he did so to make her laugh.

When asked whether he had ever put the victim's hand on his penis, defendant said he was not sure. He denied masturbating in her presence or thinking of her while masturbating, volunteering that "the only thing, I like would do that is like, uh, watching anime or something . . . ." During the interview, defendant also volunteered that he had been abused and said he would not want to abuse or hurt the victim.

At trial, defendant—then 36 years old—testified in his own defense through an interpreter. He denied all of the victim's accusations, including that he ever licked her vagina. He blamed his contrary admission to the detective on illness, poor English language skills, and police pressure. Defendant maintained at trial that the victim removed her pants, underwear, and shirt when, prior to going to *The Lego Movie*, he asked what size clothing she wore. He testified that, on the same occasion, his hand got stuck in the victim's pants (but outside of her underwear) as he helped her pull up her pants and underwear.

### ***B. Procedural History***

In the operative second amended information, filed on May 9, 2016, the Santa Clara County District Attorney charged defendant with six counts of oral copulation or sexual penetration of a child age 10 or younger (Pen. Code, § 288.7, subd. (b); counts 1, 4, 5, 7, 9, and 14);<sup>1</sup> seven counts of forcible lewd conduct with a child (§ 288, subd. (b)(1); counts 2, 3, 8, 11, 13, 16, and 17); one count of sexual intercourse or sodomy with a child age 10 or younger (§ 288.7, subd. (a); count 6); two counts of lewd conduct with a child (§ 288, subd. (a); counts 10 and 15); and one count of attempted sexual intercourse or sodomy with a child age 10 or younger (§§ 288.7, subd. (a), 664; count 12). The second amended information also alleged that counts 2, 3, 8, 10, 11, 13, 15, 16, and 17 involved the same victim on separate occasions (§ 667.6, subd. (d)).

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

The case proceeded to a jury trial in April 2016. The jury returned guilty verdicts on all 17 counts on May 12, 2016.

The trial court sentenced defendant on January 27, 2017. The court imposed the following determinate terms: nine years on count 12, a consecutive 10 years on count 2, a consecutive 10 years on count 3, a consecutive eight years on count 8, a consecutive two years on count 10, a consecutive eight years on count 11, a consecutive eight years on count 13, a consecutive two years on count 15, a consecutive eight years on count 16, and a consecutive eight years on count 17, for a total of 73 years. The court imposed the following indeterminate terms: 25 years to life on count 6, a consecutive 15 years to life on count 1, a consecutive 15 years to life on count 4, a concurrent 15 years to life on count 5, and a consecutive 15 years to life on count 9, for a total of 70 years to life. The court orally imposed sentences of “15 years consecutive” on counts 7 and 14. After sentencing defendant on each count, the trial court stated that the total aggregate term was 100 to life consecutive to 73 years.<sup>2</sup> The abstract of judgment and minute order state that the total term is 85 years to life consecutive to 75 years; they are inconsistent with the court’s oral pronouncement of sentence in other ways too, as discussed below.

Defendant timely appealed.

## **II. DISCUSSION**

### ***A. Admission of Testimony that Defendant was Sexually Abused as a Child***

Defendant contends the trial court erred by permitting the prosecutor to ask him, on cross-examination, about being sexually abused as a child. That testimony should have been excluded, defendant says, as irrelevant or under Evidence Code section 352. We disagree and further conclude that any error was harmless.

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<sup>2</sup> It appears that while the court orally imposed determinate terms of 15 years on counts 7 and 14, it treated those terms as indeterminate in reaching the aggregate term, adding 25 years to life (count 6) plus 15 years to life (count 1) plus 15 years to life (count 4) plus 15 years to life (count 9) plus 15 years (count 7) plus 15 years (count 14) to reach an aggregate indeterminate term of 100 years to life.

*1. Factual Background*

During his police interview, which was played for the jury at trial, defendant volunteered that, a “long, long time ago,” he was “abuse[d]” and he “d[id]n’t want to do . . . that” to the victim. At trial, the prosecutor asked defendant about that statement on cross-examination. The following exchange ensued:

“[Prosecutor:] [Y]ou said that you were sexually abused before?

“[Defendant:] During a part of my life that did happen, but I would like for that part of my life not to be asked about.

“[Prosecutor:] I’m not going to go into the details of what happened, okay? I promise you that. How old were you, though, when it happened?

“[Defendant:] 5 years.

“[Prosecutor:] How long did it happen for?

“[Defense Counsel]: Objection. Relevance.

“THE COURT: I’ll allow it.

“[Defendant:] A couple of times.

“[Prosecutor:] And did you tell anybody?

“[Defendant:] No.

“[Defense Counsel]: Objection. Relevance, continuing through this entire line of questioning.

“[Prosecutor:] Why didn’t you tell anybody?

“[Defendant:] Because I didn’t know what to do at that moment.

“[Prosecutor:] So you were young; right?

“[Defendant:] Yes, but I went to therapy so they would help me forget it. I went to church with my mom and they taught me to forget.

“[Prosecutor:] You want to block those things out; right?

“[Defendant:] I forgot that.

“[Prosecutor:] You don’t want to remember it; right?

“[Defendant:] No.

“[Prosecutor:] And—how old were you when someone found out?

“[Defendant:] I’m not sure.

“[Prosecutor:] Were you older? A little bit older?

“[Defendant:] I don’t remember.

“[Prosecutor:] It’s hard to remember, something that bad; right?

“[Defendant:] I remember all my life.

“[Prosecutor:] It sticks with you?

“[Defendant:] No.

“[Prosecutor:] Did some time pass before someone found out?

“[Defendant:] Please, I had told you [that] I no longer want to answer any of that.”

## 2. *Legal Principles and Standard of Review*

Only relevant evidence is admissible. (Evid. Code, § 350.) The Evidence Code defines “relevant evidence” broadly as “evidence . . . having *any tendency in reason* to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210, italics added.) “ ‘[T]he trial court has broad discretion to determine the relevance of evidence.’ ” (*People v. Tully* (2012) 54 Cal.4th 952, 1010.)

A trial court has the discretion to “exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) For purposes of Evidence Code section 352, evidence is “prejudicial” if it “ ‘ ‘uniquely tends to evoke an emotional bias against defendant’ ” without regard to its relevance on material issues.” (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) “ ‘ “[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to

reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.” ’ ’ ( *People v. Scott* (2011) 52 Cal.4th 452, 491.)

“On appeal, ‘an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence.’ ” ( *People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008.) A trial court abuses its discretion when its ruling falls outside the bounds of reason. ( *People v. Benavides* (2005) 35 Cal.4th 69, 88.)

3. *The Trial Court Did Not Abuse its Discretion in Concluding That the Testimony Was Relevant*

Jurors first learned of defendant's own childhood sexual abuse when a recording of his police interview was played, without defense objection, during the prosecutor's case in chief. As noted above, defendant volunteered that he was an abuse victim during his police interview. Defendant now says the prosecutor's questions following up on that disclosure during cross-examination were irrelevant.

Where a defendant chooses to testify on his own behalf at trial, “the People may cross-examine him to test his credibility or otherwise refute his statements.” ( *People v. Lena* (2017) 8 Cal.App.5th 1145, 1149.) “ ‘A prosecutor is permitted wide scope in the cross-examination of a criminal defendant who elects to take the stand.’ ” ( *People v. Sánchez* (2016) 63 Cal.4th 411, 473.) In view of the foregoing rules, the prosecutor was entitled to test defendant's credibility by questioning him about the statements he made to police, including his statement that he had been a victim of abuse. Defendant's responses were relevant to the credibility of his statements to police. Therefore, the court did not abuse its discretion in overruling defendant's relevance objection.

4. *The Trial Court Did Not Abuse its Discretion Under Evidence Code Section 352*

With respect to Evidence Code section 352, defendant argues that his testimony regarding his own abuse “was extremely prejudicial” because it “could only have planted in the jurors’ minds the notion that because appellant had been abused as a child, he fit the profile of an abuser and therefore must have abused [the victim].”<sup>3</sup> The prosecutor made no such argument and no evidence was admitted that abuse victims are more likely to abuse. Even assuming jurors might have been prejudiced against defendant because he was abused, it is equally probable that his testimony would have generated sympathy for him among jurors. Accordingly, we cannot say the court abused its discretion in concluding that the evidence was not substantially more prejudicial than it was probative.

Defendant also argues that his “reticence to talk about the abuse may have suggested to jurors that since he was not fully candid about this topic, the same could hold true for the rest of his testimony with the end result being the undermining of his credibility.” Defendant’s reluctance to discuss his abuse is not the sort of evidence that is “likely to provoke emotional bias against [him] or to cause the jury to prejudge the issues upon the basis of extraneous factors. [Citations.]” (*People v. Jenkins* (2000) 22 Cal.4th 900, 1008.) Accordingly, even if defendant’s own responses reflected poorly on his

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<sup>3</sup> In a related argument, defendant argues the evidence of his own abuse constituted inadmissible profile evidence designed to show that he fit the profile of a child molester. “A profile ordinarily constitutes a set of circumstances—some innocuous—characteristic of certain crimes or criminals, said to comprise a typical pattern of behavior. In profile testimony, [an] expert compares the behavior of the defendant to the pattern or profile and concludes the defendant fits the profile.” (*People v. Prince* (2007) 40 Cal.4th 1179, 1226.) The prosecutor never suggested that defendant’s childhood sexual abuse made him predisposed to commit the charged crimes. But even assuming the testimony was profile evidence, that is not an independent ground for its exclusion; profile evidence “is inadmissible only if it is either irrelevant, lacks a foundation, or is more prejudicial than probative.” (*People v. Smith* (2005) 35 Cal.4th 334, 357.)

credibility, that does not establish that the evidence of his abuse was unduly prejudicial within the meaning of Evidence Code section 352.

5. *Any Error was Harmless*

Even assuming the trial court erred in permitting the prosecutor to question defendant regarding his voluntary disclosure to police that he had been abused, that error was harmless.

Generally, the admission of evidence in violation of state law, such as the Evidence Code, is reversible only upon a showing that it is “reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Partida* (2005) 37 Cal.4th 428, 439 (*Partida*).) A due process clause violation, requiring review under the more stringent federal standard set forth in *Chapman v. California* (1967) 386 U.S. 18, occurs where the admission of the evidence “makes the trial *fundamentally unfair*.” (*Partida, supra*, at p. 439.) We fail to see how defendant’s brief testimony regarding abuse he suffered, evidence of which already had been admitted without objection, made his lengthy trial fundamentally unfair. Therefore, assuming any error occurred, we apply the *Watson* harmless error standard.

Under that standard, we ask whether there is “ ‘a *reasonable chance*’ ”—which is “ ‘more than an *abstract possibility*’ ” but need not be “ ‘more likely than not’ ”—that a result more favorable to defendant would have been reached had he not testified about his abuse. (*People v. Vasquez* (2017) 14 Cal.App.5th 1019, 1041.) There is not.

The victim testified in detail about the molestations. Her testimony was consistent with her prior descriptions of the abuse to her mother and to police during three recorded interviews.<sup>4</sup> Jurors plainly credited her testimony, convicting defendant on all 17 counts

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<sup>4</sup> The victim did not discuss each molestation when she first disclosed the abuse to her mother, nor did she detail every instance of abuse in each interview. However, each time she discussed a particular molestation, her descriptions were largely consistent.

after deliberating for less than five hours. By contrast, jurors disbelieved defendant's testimony, in which he denied the molestations, recanted his admission to police that he licked the victim's vagina, and attempted to explain away parts of the victim's account.<sup>5</sup> It is not reasonably probable that even a single juror would have harbored reasonable doubt as to defendant's guilt had jurors not heard defendant's brief testimony regarding his own childhood abuse, about which jurors already were aware.

***B. Admission of Defendant's Testimony Regarding Anime***

Defendant argues his testimony on cross-examination about his desire to masturbate to anime should have been excluded as irrelevant or because its probative value was substantially outweighed by the probability that its admission would create substantial danger of undue prejudice. We find no reversible error.

***1. Factual Background***

During his police interview, defendant denied masturbating while he was with or thinking about the victim. He then stated, "The only thing, I like would do that is like, uh, watching anime or something . . . ." The prosecutor asked defendant at trial whether he masturbates to anime. Defendant testified that he had thought about masturbating to anime but had done so; he explained that he stopped masturbating at age 21 because it hurt him. He agreed that anime is "a Japanese cartoon" in which the characters have "really big eyes" and "look really young." He denied familiarity with anime depicting sexual themes. He also denied masturbating to or being sexually excited by young-looking anime characters. Defendant testified that the type of anime he watches is not sexual; it involves action, adventure, and fighting and depicts warriors, Greek Gods, and knights. During a sidebar, defense counsel objected unsuccessfully to the "entire *anime*

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<sup>5</sup> For example, defendant claimed that the victim's response when he asked what size clothing she wore was to remove all of her clothes. And he explained that he touched the victim's buttocks by accident when he helped her—a nine-year-old—pull up her pants and underwear and his hand got stuck in her pants.

discussion” on relevance grounds. Defense counsel later objected under Evidence Code section 352. The court also admitted several anime images. Two of the anime images, introduced by the prosecutor, depict what appear to be young girls in suggestive poses. In one, a girl leans over, displaying her cleavage. The other shows a girl in what appears to be a school uniform with a short skirt and thigh-high socks. The other images, introduced by the defense, depict warriors from the type of anime defendant testified that he watches.

2. *Any Error in Admitting the Anime Testimony Was Harmless*

Defendant contends that his desire to masturbate to animated depictions of adults was irrelevant and prejudicial because it suggested to jurors that he was “bizarre.” The Attorney General responds that the evidence was relevant to whether defendant is sexually interested in young girls, because some anime depicts suggestive images of cartoons that look like young girls. As to Evidence Code section 352, the Attorney General does not address the potentially prejudicial nature of the evidence, instead arguing lack of jury confusion.

“In certain circumstances, evidence of sexual images possessed by a defendant has been held admissible to prove his or her intent.” (*People v. Page* (2008) 44 Cal.4th 1, 40 (*Page*); see *People v. Memro* (1995) 11 Cal.4th 786, 864 [evidence that defendant possessed sexually explicit pictures of prepubescent males supported inference that defendant was sexually attracted to young boys and, thus, was admissible to show defendant’s intent to molest a young boy] overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1102 [“evidence of defendant’s adult-oriented magazines and videotape rentals was relevant because there was a rational connection between his possession of this material and his intent and motive when he abducted” the victim].)

Assuming the testimony had some relevance, given that defendant raised the topic during his police interview, its probative value was relatively low. Defendant denied watching sexually themed anime or being sexually excited by anime depicting what appear to be young girls. Also, the evidence did not clearly establish that anime sexually depicts girls that appear as young as three to five years old, the age of the victim at the time most of the molestations occurred. (See *Page, supra*, 44 Cal.4th at p. 40 [images admitted “had less probative value than the images considered in prior cases” because models in photographs did not appear “to be as young as the victim”].) The anime images the prosecutor introduced showed a girl with cleavage, presumably a teenager, and a girl in a school uniform, attire not typically associated with preschoolers and kindergarteners.

We need not decide whether the trial court abused its discretion in permitting the prosecutor to question defendant about anime, because defendant fails to establish that any such error was prejudicial. The *Watson* harmless error standard applies to the assumed violation of the Evidence Code.<sup>6</sup> (*Page, supra*, 44 Cal.4th at pp. 41-42

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<sup>6</sup> The cases defendant cites do not support the conclusion that the admission of testimony regarding his desire to masturbate to animated depictions of adults rendered his trial fundamentally unfair. Defendant’s testimony about anime was not significant in the context of the trial as a whole. (See *Collins v. Scully* (2d Cir. 1985) 755 F.2d 16, 19 [holding that erroneously admitted evidence “must have been ‘crucial, critical, highly significant’ ” to deny the defendant a fundamentally fair trial].) Defendant’s unconsummated interest in masturbating to animated depictions of adults, presumably in the privacy of his own home, is not the sort of highly inflammatory evidence that necessarily prevents a fair trial. (See *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920-921 [holding that admission of evidence that the defendant was apprehended driving a car with \$135,000 in the trunk did not render his trial fundamentally unfair, in part because “the evidence was not highly inflammatory but relatively sterile: There’s nothing illegal or immoral about carrying large sums of cash in the trunk of a car . . . ”].) And *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, superseded by statute as recognized in *Torres v. Barnes* (N.D. Cal. 2014) 2014 U.S. Dist. LEXIS 132081\*28 is factually distinguishable. There, defendant was on trial for the murder of his mother, who was killed with a knife police never identified. The case against him was “solely circumstantial”—he was at the scene (the family home) and a pair of his pants with blood

[applying *Watson* to assumedly erroneous admission of pornographic magazines in capital murder trial].)

It is not reasonably probable that a result more favorable to defendant would have been reached had he not testified about his interest in masturbating to anime. As discussed above, the victim provided detailed testimony that was consistent with her prior descriptions of the abuse. Defendant admitted to police that he licked the victim's vagina, only to change his story at trial. Portions of his trial testimony defied common sense, including his claim that he got his hand stuck in the victim's pants while helping her—a nine-year-old—pull up her pants. It is not reasonably probable that absent defendant's anime testimony a single juror would have had reasonable doubt as to his guilt.

### ***C. Cumulative Error***

Defendant contends that the cumulative effect of the two evidentiary errors he raises was to deprive him of his right to due process. “Under the cumulative error doctrine, the reviewing court must ‘review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.’ ” (*People v. Williams* (2009) 170 Cal.App.4th 587, 646.) “The ‘litmus test’ for cumulative error ‘is whether defendant received due process and a fair trial.’ ” (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) We have assumed a single error, the erroneous admission of the anime testimony, so there are no errors to cumulate. Thus, the claim must fail.

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on them was found in the house. (*Id.* at p. 1385.) Circumstantial evidence also implicated defendant's father, who also was found at the scene with bloody clothing. (*Id.* at pp. 1385-1386.) Under those circumstances, the erroneous admission of irrelevant evidence that the defendant had a knife collection, at times wore a knife when wearing camouflage, and scratched the words “Death is His” into a door in his dormitory rendered the trial fundamentally unfair. (*Id.* at pp. 1383, 1386.)

#### ***D. Unauthorized Sentence***

The court orally imposed a determinate term of 15 years on count 7 (§ 288.7, subd. (b)).<sup>7</sup> That sentence is unauthorized because section 288.7, subdivision (b) mandates an indeterminate prison term of “15 years to life.” (*People v. Scott* (1994) 9 Cal.4th 331, 354 [“a sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case”].)

We may correct an unauthorized sentence on our own motion, even in the absence of an objection in the trial court. (See *People v. Smith* (2001) 24 Cal.4th 849, 852 [unauthorized sentences “are reviewable ‘regardless of whether an objection or argument was raised in the trial and/or reviewing court’ ”; *People v. Moreno* (2003) 108 Cal.App.4th 1, 10 [“invalid or unauthorized sentence is subject to correction whenever it comes to the court’s attention”].) “ ‘ “When an illegal sentence is vacated, the court may substitute a proper sentence, even though it is more severe than the sentence imposed originally.” [Citations.]’ [Citations.]” (*People v. Martinez* (2015) 240 Cal.App.4th 1006, 1015.) Accordingly, we shall modify the judgment to reflect a sentence of 15 years to life on count 7 (§ 288.7, subd. (b)).

The court also orally imposed an unauthorized determinate term of 15 years on count 14 (§ 288.7, subd. (b)).<sup>8</sup> By contrast, the abstract of judgment and minute order

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<sup>7</sup> There is some ambiguity in the court’s oral pronouncement of sentence, as the court imposed a term of “15 years consecutive” but included that 15 years in aggregating the indeterminate terms. The probation report accurately recommended a sentence of 15 years to life on count 7. The court may have intended to impose an indeterminate term and inadvertently omitted the words “to life” in pronouncing sentence. The abstract of judgment and minute order reflect the orally imposed determinate term of 15 years on count 7.

<sup>8</sup> As with count 7, the oral pronouncement is internally inconsistent as to count 14, because the court imposed a term of “15 years consecutive” but included that 15 years in aggregating the indeterminate terms. The probation report accurately recommended a sentence of 15 years to life on count 14. Thus, as we noted in connection with count 7, the court may have inadvertently omitted the words “to life” in pronouncing sentence on count 14.

indicate an indeterminate term of 15 years to life on count 14. Generally, the record of the oral pronouncement of the court controls over both the clerk's minute order (*People v. Farrell* (2002) 28 Cal.4th 381, 384, fn. 2 (*Farrell*)) and the abstract of judgment (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 (*Mitchell*)). However, given our obligation to correct unauthorized sentences, we conclude that an oral pronouncement of an unauthorized sentence does not control over a correct, mandatory sentence reflected in the minute order and abstract of judgment. Accordingly, we shall modify the oral pronouncement of judgment to reflect a sentence of 15 years to life on count 14 (§ 288.7, subd. (b)).

We make the foregoing modifications to the judgment without requesting supplemental briefing. We do so in the interest of judicial economy because the sentencing errors and the appropriate remedies are clear. (*People v. Taylor* (2004) 118 Cal.App.4th 454, 456 (*Taylor*).) Moreover, our modifications, along with our corrections to the abstract of judgment and minute order discussed below, result in an aggregate sentence of 100 years to life consecutive to 73 years, which is the sentence the parties agree the court imposed. Any party that nevertheless is aggrieved may petition for rehearing. (*Id.* at p. 457; Gov. Code, § 68081.)

***E. Errors in Abstract of Judgment and Minute Order***

Defendant argues, and the Attorney General concedes, that the abstract of judgment and minute order erroneously indicate that the court imposed a 10-year term on count 11, when in fact it imposed an eight-year term. We agree.

As noted, the record of the oral pronouncement of the court generally controls over the clerk's minute order (*Farrell, supra*, 28 Cal.4th at p. 384, fn. 2) and the abstract of judgment (*Mitchell, supra*, 26 Cal.4th at p. 185). "Courts may correct clerical errors at any time, and appellate courts . . . that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts." (*Ibid.*) When there is a clerical error in the abstract of

judgment, “the appellate court itself should order the trial court to correct the abstract of judgment.” (*Id.* at p. 188.) Therefore, we will order the abstract of judgment corrected to reflect that the court imposed an eight-year term on count 11; we also will direct the trial court to correct any errors contained in its internal records, including the minute order.

Our review of the record has revealed additional errors in the abstract of judgment and minute order. In sentencing defendant, the trial court orally specified that the sentences on counts 7 and 9 were to be consecutive. But the abstract of judgment indicates that defendant’s sentences on counts 7 and 9 are to run concurrently. The minute order correctly indicates that the sentence on count 9 is consecutive, but incorrectly indicates that the sentence on count 7 is concurrent. The abstract of judgment and minute order indicate a total prison term of 85 years to life, consecutive to 75 years. The correct aggregate term is 100 years to life consecutive to 73 years.<sup>9</sup> We will order the abstract of judgment corrected to reflect that the court imposed consecutive terms on counts 7 and 9 and an aggregate term of 100 years to life consecutive to 73 years. We order these corrections without supplemental briefing in the interest of judicial economy. (*Taylor, supra*, 118 Cal.App.4th at p. 456.) The parties have the option to petition for rehearing. (*Id.* at p. 457; Gov. Code, § 68081.)

### **III. DISPOSITION**

The judgment is modified to reflect a sentence of 15 years to life, consecutive, on count 7 (§ 288.7, subd. (b)). The oral pronouncement of judgment is modified to reflect a sentence of 15 years to life, consecutive, on count 14 (§ 288.7, subd. (b)). As modified, the judgment is affirmed. The superior court is directed to amend the abstract of

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<sup>9</sup> The 73-year determinate term is calculated as follows: nine years (count 12) plus 10 years (count 2) plus 10 years (count 3) plus eight years (count 8) plus two years (count 10) plus eight years (count 11) plus eight years (count 13) plus two years (count 15) plus eight years (count 16) plus eight years (count 17). The 100-year-to-life indeterminate term is calculated as follows: 25 years to life (count 6) plus 15 years to life (count 1) plus 15 years to life (count 4) plus 15 years to life (count 9) plus 15 years to life (count 7) plus 15 years to life (count 14).

judgment to reflect the oral pronouncement of judgment, as modified. Specifically, the amended abstract of judgment should reflect a consecutive 15-year-to-life sentence on count 7, a consecutive 15-year-to-life sentence on count 14, a consecutive eight-year sentence on count 11, a consecutive 15-year-to-life sentence on count 9, and a total term of 100 years to life consecutive to 73 years. The superior court is further directed to deliver a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. The trial court also should correct its internal records to ensure that they accurately reflect defendant's sentence.

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ELIA, ACTING P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.